7-25-2016

Visser v. Auto Alley, LLC Respondent's Brief Dckt. 43432

IN THE SUPREME COURT OF THE STATE OF IDAHO

DOUGLAS VISSER, a married man as to his sole and separate property, Plaintiff/Respondent, vs. AUTO ALLEY, LLC, an Idaho limited liability company, CALVIN VISSER and VICKI VISSER, as individuals in their capacity as Members and/or Managers of Auto Alley, LLC, Defendants/Appellants.	DOCKET NO. 43432-2015 Bonner County Case No. CV 2013-1045

RESPONDENT'S BRIEF

APPEALED FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR BONNER COUNTY

HONORABLE BARBARA BUCHANAN
District Judge

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I. STATEMENT OF THE CASE

Respondent, Douglas Visser ("Douglas"), notes that Appellants' Brief often fails to contain citations to the Record and fails to cite facts in the Record. For these reasons, Douglas chooses to restate Procedural History and Statement of Facts relevant to this matter.

A. Procedural History

This matter commenced with the filing of a Complaint for breach of contract, waste, writ of possession and unlawful detainer, injunctive relief and imposition of a constructive trust upon vehicles, parts and personal property on Douglas' property. (R. Vol. I, pp.28-40). Douglas also filed a Motion for Preliminary Injunction/Temporary Restraining Order supported by Affidavit. (R. Vol. I, pp.47-63). The Court entered the Order to Show Cause/Temporary Restraining Order on July 3, 2013. (R. Vol. I, pp.64-67).

The Appellants, Auto Alley, LLC, Calvin Visser and Vicki Visser, were served and appeared through counsel on July 17, 2013. Counsel for Appellants appeared at the Order to Show Cause on July 17th, and the hearing was reset to July 24th. On July 24, 2013, the parties stipulated to continuation of the Temporary Restraining Order, Preliminary Injunction and Prejudgment Writ of Attachment and further stipulated to enter into mediation. (R. Vol. I, pp.76-80).

Mediation resulted in a Mediated Settlement Agreement which was filed with the Court on January 21, 2014. (R. Vol. I, p.87). Subsequently, a Judgment was submitted to the Court stipulated to by Appellants' counsel on February 18, 2014, and was entered February 19, 2014. (R. Vol. I, pp.88-100).

From the outset, the Appellants declined, failed or refused to comply with the terms of the Judgment leading to Douglas filing his first Motion for Writ of Possession and Judgment for Quiet Title on April 3, 2014. (R. Vol. I, pp.101-158).

In April, 2014, a hearing on Douglas motion documents the initial, numerous deficiencies and failures to comply by the Appellants with the Mediated Settlement Agreement and Judgment. (Tr. 4/23/14). The Court found that the Appellants had substantially complied in moving off Lot 1, but not fully complied, and that Appellants' compliance "as of the date of this hearing is, *in significant part, due to the Plaintiffs' Motion for Writ of Possession and Quiet Title*" and ordered the Appellants to pay attorney's fees and costs, as well as rent for the extended period of occupancy outside of the requirements of the Mediated Settlement Agreement. The court further ordered Appellants to comply with the Mediated Settlement Agreement by vacating Lot 1 and by preparing and providing a full and complete Phase I Environmental Assessment of Lot 1 as prescribed by the Judgment entered February 19, 2014. (R. Vol. I, pp.141-143).

Almost immediately following the court's ruling in the April hearing, the Appellants filed a "Motion Re: Plaintiff's Interference with Defendants' Ability to Comply with the Judgment". (R. Vol. I, pp.144-158). The essence of the Motion was Appellants' attempt to continue to encroach, use or occupy Lot 1 by using a road to Lot 2 not the easement established in the Judgment and attached plat map. TheCcourt denied Appellants' Motion Re: Plaintiff's Interference with Defendants' Ability to Comply with the Judgment on May 23, 2014. (R. Vol. I, pp.159-160).

Despite two (2) clear indications from the trial court that non-compliance with the Judgment would be at Appellants' peril, following the April and May, 2014, hearings, the

Appellants failed and/or refused to comply with the Court's Judgment including the requirement of satisfying one-half (1/2) of the Note and Deed of Trust encumbering Lots 1 and 2 owed to Joe Lapham ("Lapham Debt"). These failures to comply led to Douglas filing his second Motion for Judgment of Quiet Title and Writ of Possession on March 27, 2015. (R. Vol. I, pp.173-204).

Douglas, under threat of foreclosure by Lapham, refinanced both Lots 1 and 2 at great expense in December, 2014. This led to Appellants' filing of a Motion for Contempt. (R. Vol. I, pp.164-170).

Both Appellants and Respondent's Motions were heard and testimony taken on May 28 and 29, 2015. (Tr. 5/28-29/15).

Thereafter, the court heard post-trial briefing from Appellants and Respondent.

On July 6, 2015, the trial court issued its Memorandum Decision and Order granting Douglas' Motion for Judgment of Quiet Title and Motion for Writ of Possession and further ordering the Appellants to vacate the entire premises of Lots 1 and 2 no later than 5:00 p.m. August 7, 2015. Further, the court entered an award of attorney's fees and costs to Douglas. (R. Vol. III, pp.466-476).

The court entered a Writ of Possession on July 16, 2015. (R. Vol. III, pp.490-492)

On August 7, 2015, Judgment entered Re: Judgment of Quiet Title in favor of Respondent. (R. Vol. III, pp.572-574).

Appellants filed a Motion to Reconsider and the court issues its Memorandum Decision and Order denying the Motion to Reconsider on August 7, 2015. (R. Vol. III, pp. 564-571).

Appellants filed their Notice of Appeal on August 6, 2015.

B. Statement of Facts

Factually, this case is somewhat more complex than its Procedural History recited above.

On February 7, 2005, Vicki Visser was granted a divorce from Douglas Visser by Kootenai County Decree. (Plaintiff's Exhibit 9.)[1] The Divorce Decree awards all of the community interest in the 31564 Highway 200, Ponderay, Idaho property to the defendant in that divorce proceeding, Douglas Visser. (Plaintiff's Exhibit 19, p.2.)

The trial testimony established that both Douglas and Vicki had incurred prior to divorce a debt which was encumbering the Ponderay property.

The trial testimony further established that prior to Douglas' and Vicki's divorce, the property had been operated by them and their predecessors in interest as a wrecking yard. Those prior operations had incurred to the Vissers an obligation for cleanup and mitigation through the State Department of Environmental Quality and/or Federal EPA. (Trial Tr. p. 357)[2]

Further, Douglas was not operating the property in 2005 as a wrecking yard, but had incurred obligations relative to the DEQ cleanup from prior operations, which fell to Douglas as owner of the property. (Tr. p.358)

Later in 2005 or 2006, the Defendant, Calvin Visser ("Calvin"), Douglas' son, approached him asking to operate a wrecking yard on the back lot known as Lot 2.

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[1] Exhibits introduced in evidentiary proceedings on May 28 and 29, 2015, will be referred to as "Exhibits" as distinguished from exhibits introduced at the April 23, 2014, and May 21, 2014, proceedings, which will be referenced by date.

[2] "Trial Transcript" will refer to the evidentiary proceeding held May 28 and 29, 2015, as contrasted to the April 23 and May 21, 2014, hearings, which will be referenced by date.

Shortly after Douglas consented to this arrangement, Vicki Visser joined their son, Calvin, in operating on Lot 2. (Trial Tr. pp.359-360).

The original agreement between Douglas and his ex-wife, Vicki, and son, Calvin, was that the Appellants would pay and service the underlying note owed to Joe Lapham, which at that time in 2005 or 2006 was $111,000.00. Further, they would pay all taxes and keep the grounds clean and free from pollution or additional exposure to the DEQ liabilities that had been incurred prior to 2005, when they took occupancy. (Tr. pp.361-362)

In this agreement, the Appellants were permitted to use one of the warehouses on Lot 1 and were to keep all inventory on the back lot, Lot 2. Almost from the outset, the Appellants did not comply and used the entirety of Lotl and Lot 2 for their operation, including Douglas' residence on Lot 1. (Trial Tr. pp.363-365.)

Initially, the Appellants did pay taxes and the Lapham Debt, which was escrowed at Panhandle Escrow Services. In the early spring of 2013, Douglas discovered the mail with County notice that the property was in jeopardy of tax sale.[3] When the Appellants were confronted with the tax arrearage and jeopardy of tax sale, Calvin Visser refused to pay and Douglas was required to pay 2009 to save the property.

The parties stipulated to early mediation. Appellants had caused the Lapham Debt to rise to over $318,000.00 from the original $111,000.00. (Defendants' Exhibit "E", p.2, Section C).

[3] Mail delivery to both Appellants and Respondent was intermingled at a mail box delivery on the premises. (Trial Tr. p.368)

The Mediated Settlement Agreement provided for, among other things, the Appellants' obligation to pay and satisfy one-half (1/2) of the Lapham Debt no later than June 30, 2014. The Mediated Settlement Agreement further provided for continued occupancy of the premises and obligated the Appellants to bring current all taxes owed on the property.

The Mediated Settlement Agreement was subsequently committed to form of a Judgment and an Amendment, Modification and/or Correction of the Deed of Trust and Promissory Note entered into with Mr. Lapham. The Modification reflects that Lapham declined to allow a "splitting" of the debt between Lots 1 and 2 and instead required a six percent (6%) increase of the debt and Mr. Lapham would only agree to release Lot 2 (the lot intended to be transferred to Vicki Visser upon compliance with the Judgment) once one half (1/2) of that debt had been paid to Lapham. The negotiations with Mr. Lapham also required a $5,000.00 "fee", which Douglas paid in October, 2013. Lapham in exchange agreed to simply limit foreclosure first on Lot 1 and then against Lot 2 in the event of a deficiency after sale of Lot 1. This was Lapham's requirement in lieu of a splitting of the debt as originally agreed by the Mediated Settlement Agreement. (See Defendants' Exhibit "B".) Further, Mr. Lapham's requirement on these terms was that the existing default from 2013 would remain in place until full performance of the agreements contained in the Modification. (See Plaintiff's Exhibit 30.)

The Judgment entered February 19, 2014, is explicit in its requirements as follows:

a. Douglas will only convey Lot 2 to Vicki upon condition that Appellants have "fully and completely" performed all of the obligations as set forth in the agreement. (Plaintiff's Exhibit 17, p.2, Section A.)

b. Conditioned on the Appellants' performance of all other terms and conditions of the Judgment, Douglas would secure a Final Plat and division of Lots 1 and 2 to permit conveyance of Lot 2 once those conditions were met. (Plaintiff's Exhibit 17, pp.2-3, Section A.1.)

c. If the Appellants failed to make timely payments or performance under the terms of the Judgment, the Respondent was entitled to an immediate Writ of Possession ordering Appellants to vacate the premises. (Plaintiff's Exhibit 17, p.3.)

d. The Appellants were required to pay all remaining balance of their share of the Lapham Debt inclusive of interest and fees by June 30, 2014. (Plaintiff's Exhibit 17, pp.3-4.)

e. In the event of default by Appellants, Douglas was entitled to a Writ of Possession and also a Judgment of Quiet Title directing the Sheriff to restore possession of the premises to Douglas, removing all personal property or inventory of the Appellants'. (Plaintiff's Exhibit 17, pp.6-7.)

In addition to the items and provisions of the Judgment set forth above, it is undisputed from the testimony that Appellants did not comply with the conditions of Judgment.

According to Jackie Fuqua's testimony, Manager of Panhandle Escrow, she created a fictitious account showing the Appellants' unpaid balance as of December 31,

2014. (Trial Tr. pp. 148-150). The balance owed by Appellants, not accounting for Douglas' payments in 2013 to 2014, was over $34,470.96. (Plaintiff's Exhibit 21).

Giving credit to Douglas for various payments including the $5,000.00 paid in May, 2014 to escrow and the $5,000.00 paid by Douglas to Lapham for consideration of the Modification in October, 2013, Vicki's unpaid obligations towards the Lapham Debt rises substantially. (See Plaintiff's Exhibit 17, p.4, Section 5 and Defendants' Exhibit "C", p.3, Section 2.)

This also does not account for the $2,500.00 per month payments made in October, November and December, 2013, toward the escrow from the payments received from Vicki Visser per the Mediation Agreement.

These additional payments, if credited, brings the obligation owed by Vicki to over $50,000.00. Jacki Fuqua also testified that additional interest had accrued at nine percent (9%) from February to the year end 2014, which is not accounted for in either the $34,470.96 or the $50,000.00 plus figures.

Additionally to these defaults, it was undisputed to the trial testimony that Vicki Visser did not account for the "proceeds of crushing, removal, sale or disposition" by payment directly to the trust account of Brent C. Featherston as provided by the Judgment. (Plaintiff's Exhibit 17, p.5) Vicki Visser unilaterally chose to make payments that were delivered to counsel but never did account for the proceeds as required by the Judgment. (Plaintiff's Exhibit 17, p.5, Section A-6)

Finally, Appellants did not comply with the court's Judgment vacating Lot 1 on or before March 31, 2014, or by the extended deadline of April 30th as provided by the Court's Order following the hearing on April 23, 2014. (Tr. 4/23/14, R. Vol. I, pp.141-

143.) The undisputed testimony establishes that personal property was left on the premises after the April 30th deadline. Appellants continued to use Lot 1 by encroaching upon it by use of an old road through the center of Lot 1 but which was not provided as an easement or access to Lot 2, even up to the trial in May, 2015.

Further, the undisputed testimony establishes damage to the premises upon Appellants vacating Lot 1. Appellants argued at trial they were not responsible for the damage and that the damage had predated their occupancy from 2005 through April 30, 2014.

The testimony at trial established that the Appellants did not provide the Phase I Environmental Study contemplated by the Mediated Settlement Agreement and required by the court's Judgment. Although a report was provided, the Judgment held Appellants liable for any damages to the premises during their occupancy and therefore held them liable for any cleanup, remediation or certification of remediation. Appellants indicated that they believed they had remediated but no testimony established- up inspection.

On the issue of damage, the property and buildings sustained considerable damages and the driveway, parking lot and access road also sustained damage which was inadequately repaired or not repaired at all by Appellants during and after their move out.

For these reasons and others, the court held that the Appellants had failed to comply with the Judgment and entered Judgment of Quiet Title and Writ of Possession in favor of Respondent, Douglas Visser.

This appeal follows and essentially reiterates the prior arguments without presenting new evidence or law.

II. STANDARD OF REVIEW

On the two (2) basic issues raised by Appellants, the Standard of Review is dispositive. Appellants challenge the District Court's Findings of Fact as being unsupported by the record on Appellants' issue regarding Appellants' failure to perform terms and conditions of the Stipulated Judgment. The two issues raised are that the Court enforced an inequitable forfeiture provision when enforcing the terms of the parties' stipulated judgment arising from their settlement agreement and the Court's finding of fact that Douglas did not prevent Appellants' performance.

"The trial court's findings of fact shall not be set aside on appeal unless found to be clearly erroneous. Appellate Court is not to substitute its view of the facts for that of the trial court who has had opportunity to weigh conflicting evidence and to judge creditability of witnesses." "It is the province of the trial court to weigh conflicting evidence and to judge the credibility of witnesses. On appeal, this court examines the record to see if challenged findings of fact are supported by substantial and competent. Evidence is regarded as substantial if a reasonable trier of fact accept it and rely upon it in determining whether a disputed point of fact has been proven." Pinnacle Engineers, Inc. v. Heron Brook, LLC, 139 Idaho 756, 758, 86 P.3d 470, 472 (2004).

Although not raised before the Trial Court, Appellants now also argue on appeal that the Stipulated Judgment is unenforceable as a matter of law as it contains a "forfeiture provision". Appellants assert that the District Court abused its discretion in granting the forfeiture.

"When reviewing a trial court's ruling under the abuse of discretion standard, we inquire (1) whether the trial correctly perceived the issue as one of discretion; (2) whether

the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to do it; and, (3) whether the trial court reached its decision by an exercise of reason." Newberry v. Martens, 142 Idaho 284, 292, 127 P.3d 187, 196 (2005). Again, with regard to the Trial Court's rulings in this case, there is no showing of an abuse of discretion by the Appellants.

This Court should affirm the Trial Court's rulings simply based upon the standard of review that applies to Appellant's claims on appeal. The Appellants simply ask this Court to second guess the Trial Court's findings of fact that: 1) enforcement of the judgment is not an inequitable forfeiture; and, 2) that Douglas did not prevent Appellants from performing their obligations under the Judgment. The Respondent requests attorney's fees and costs.

III. ARGUMENT

At the outset, the Respondent notes that the Appellant, apparently intentionally, declined to provide a record of the hearing on Appellants' Motion for Reconsideration heard August 5, 2015. When Respondents attempted to augment the record, Appellants objected saying they deemed that hearing unnecessary even though their Notice of Appeal (filed the next day) is taken from the Court's decision and judgment after the Motion for Reconsideration. See: Objection to Respondent's Motion to Augment filed June 30, 2016.

"Without an adequate record, we have no ability to determine what evidence was presented and we must assume it would support the district court's conclusion..." Fritts v. Liddle & Moeller Const., Inc., 158 P.3d 947, 951, 144 Idaho 171, 175 (2007)

Further, since Appellants primary arguments on appeal is with the Trial Courts ruling on their forfeiture argument that Douglas prevented their compliance, it is imperative that the appellate record reflect whether the Appellants argued or asserted those claims on the Motion for Reconsideration. They chose, intentionally, not to provide this Court with that record on appeal.

"'This Court does not review an alleged error on appeal unless the record discloses an adverse ruling forming the basis for the assignment of error.'" Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport & Toole, P.S., 365 P.3d 1033, 1045, 159 Idaho 679, 691 (2016)

The Court in Liberty declined to address issues not supported by the record. "It is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal. In the absence of an adequate record on appeal to support the

appellant's claims, we will not presume error." Belk v. Martin, 39 P.3d 592, 600, 136 Idaho 652, 660 (2001); quoting State v. Murphy, 133 Idaho 489, 491, 988 P.2d 715, 717 (App. 1999).

This Court must decline to consider either of Appellants issues on appeal as they failed to present a record to support their claim of error.

A. Did the District Court's findings of fact constitute an inequitable forfeiture to Appellants?

The threshold question is whether the Appellants' challenge to the Court's Findings that no forfeiture occurred is supported by the facts of this case. If so, contrary to Appellants Brief, the mere presence of a clause which may result in loss of a benefit or reward due to their failure to perform, is not, necessarily, an inequitable forfeiture.

1. The terms of the judgment are not a forfeiture and are enforceable.

Appellants argue that the Court imposed a forfeiture upon them by entering judgment of Quiet title and Writ of Possession in favor of Douglas. This is not accurate.

Douglas was awarded the entire property in the divorce decree entered in 2005. Pl.'s Exhibit 19. Appellants had no right or title to any portion of the property until the parties entered into the mediated settlement submitted to a stipulated Judgment which provided an *opportunity* for Appellants to acquire Lot 2, "ONLY upon condition that Defendants, and each of them, *fully and completely perform*..." (Plaintiff's Exhibit 17, p.2.) The required performance by Appellants was clearly intended to reduce the Lapham debt that had nearly tripled since Appellants occupancy, pay the back taxes, and restore possession of Lot 1 to Douglas free of any damages or environmental hazards.

The Judgment provided that Appellants' failure to perform would result in entry of Judgment of Quiet Title and Writ of Possession in favor of Douglas. Pl.'s Ex. #17, Pp 6-7. Appellants failed to perform and the Court simply enforced the judgment by providing Douglas with the quiet title and possession he sought in his complaint and as awarded to him in the original divorce.

This was not a case of the Court imposing a forfeiture, rather the Court simply granted the relief provided in the Judgment as part of the parties' agreement. Notably, Douglas original complaint sought money judgment for the increased mortgage balance and unpaid taxes and for Unlawful Detainer and Writ of Possession. (R. Vol. I, Pp. 28-38.)

This case is dissimilar to Hull v. Giesler, 331 P.3d 507, 522, 156 Idaho 765, 780 (2014), where the Supreme Court reversed the District Court's self-fashioned penalty clause as an unenforceable forfeiture. Rather, the Court simply enforced the existing terms of the stipulated Judgment that represented the terms of the parties' mediated settlement agreement.[4]

"[I]f the language of the contract is plain and unambiguous, the intention of the parties must be determined from the contract itself." Mihalka v. Shepherd, 181 P.3d 473, 477, 145 Idaho 547, 551 (2008)

The District Court correctly noted that the Judgment is unambiguous in its terms that Douglas was entitled to Quiet Title and Writ of Possession on Appellants default. This was not an act of inequitable forfeiture by the Trial Court, but merely enforcement of

[4] Appellants makes some issue of discrepancies between the judgment and mediation agreement, but those were explained with testimony, generally due to Lapham's demands

the parties' agreement as submitted to Judgment. The Trial Court's decision must be affirmed and Douglas awarded fees and costs on appeal.

2. Even if the Judgment terms are deemed a forfeiture in nature it was not inequitable and the Court correctly enforced the terms of the Judgment.

"Although the law does not favor forfeitures, *courts will generally uphold contracts that expressly provide for forfeitures.*" Hull v. Giesler, 331 P.3d 507, 521, 156 Idaho 765, 779 (2014) [emphasis added]; citing, Hardy v. McGill, 137 Idaho 280, 287, 47 P.3d 1250, 1257 (2002)

This has always been the law in Idaho, even well before the Graves v. Cupic, 75 Idaho 451, 272 P.2d 1020 (1954); overruled in Benz v. D.L. Evans Bank, 152 Idaho 215, 268 P.3d 1167 (2012), that Appellants rely upon so heavily. Nearly a century ago, the Court discussed the proper application of the equitable prohibition on enforcing a forfeiture:

> The better view is that the rule is not absolute or inflexible, any more than is every forfeiture harsh and oppressive; that its influence and operation do not extend beyond the reasons which underlie it, and that in cases, otherwise properly cognizable in equity, there is no insuperable objection to the enforcement of a forfeiture when that is more consonant with the principles of right, justice, and morality than to withhold equitable relief.
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> Sullivan v. Burcaw, 208 P. 841, 843 (1922)

It is clear when reading the body of case law in Idaho, that the Courts can, and do, enforce forfeiture clauses where the parties have made such clauses a part of their agreement, so long as the defaulting party's procedural rights are adequately provided for

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or Appellants untimely performance.

and the contract is complied with by the other party. See: Stockmen's Supply Co. v. Jenne, 72 Idaho 57, 237 P.2d 613 (1951) [written contract required notice]; Marks v. Strohm, 65 Idaho 623, 150 P.2d 134 (1944) [interpreting parties' contract and application of credits]; Keesee v. Fetzek, 106 Idaho 507, 512, 681 P.2d 600, 605 (Ct.App.1984)[contracts expressly providing for forfeiture "generally will be upheld"]

It should be noted that this case differs from the myriad of forfeiture cases arising from contract for deed transactions. Here, the Appellants and Douglas were parties to a pending lawsuit. At any time after entry of Judgment, either party could have sought court intervention to enforce the terms of the Judgment. In fact, Douglas did so in April, 2014 and Appellants attempted, unsuccessfully, to do so the following month. From May, 2014 until the following year, the Appellants made no attempt to complete their performance requirements and made no request for Court enforcement of the Judgment. The point is that Appellants had notice of their non-performance (see: Plaintiff's Exhibit 4) and ample opportunity to seek Court enforcement if, as they claim, Douglas was preventing performance or withholding rightful conveyance of Lot 2. They did neither.

Further, even assuming the result of the judgment is deemed a forfeiture, it is neither harsh nor oppressive nor inequitable given the financial encumbrance Appellants imposed upon Douglas in regards the Lapham debt, back taxes, or the fair market rental value of the premises at $6,000 per month from 2005 to 2014 all of which Appellants failed or refused to pay. (Tr, pp. 408-414).

Appellants assertion that the stipulated Judgment contains an unenforceable forfeiture clause is simply not supported by Idaho law. The terms of the Judgment were agreed to by Appellants but were not performed. The resulting loss of opportunity to

receive Lot 2 is a direct result of Appellants actions and are not harsh or oppressive given the magnitude of the financial impact of their prior noncompliance over the prior nine (9) years. This Court must affirm the District Court's decision and award Respondent his attorney's fees and costs.

3. Appellants, as a matter of equity, are not entitled to equitable relief from the terms of the stipulated Judgment.

Appellants complaint that the Court's enforcement of the Judgment terms is an inequitable forfeiture overlooks that Appellants *continued to be in material default of the Judgment terms even as of the date of hearing.* The Court made note of this in her Memorandum Decision:

> Finally, the Defendants ask this Court to fashion an equitable remedy, such as having the Defendants pay to the Plaintiff the $30,000.00 that he had paid to Mr. Lapham on Vicki's behalf. At no time during the evidentiary hearing did the Defendants make such an offer .... For these reasons, the Court, in the exercise of its discretion, finds that when the equities are balanced, the forfeiture granted in favor of the Plaintiff is not unconscionable and does not constitute and (sic) inequitable penalty.
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> R. Vol. III, p.7

The District Court in denying Appellants Post Trial Motion to Reconsider notes the inequitable posture of Appellants. Appellants had not complied with the terms of the Judgment, had not tendered compliance and did not attempt to comply or posture equitable measures prior to the Court's ruling on Douglas' Motion for Judgment of Quiet Title and Writ of Possession and Appellants' Motion for Contempt. (R. Vol. II, Pp. 164-204).

Further, Appellants never sought specific performance as a means of enforcing the Judgment they, themselves, had breached by motion to the court or by formal demand that Douglas specifically perform. Appellants did not tender performance or payment of their share of the Lapham debt and there is no record of such occurring.

4. Appellants have unclean hands prohibiting equitable relief.

"The Idaho courts have long subscribed to the principle that "he who comes into equity must come with clean hands," and "a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue." Hoopes v. Hoopes, 861 P.2d 88, 92, 124 Idaho 518, 522 (App.,1993)

Bearing in mind the Appellants increased the Lapham debt from $111,500.00 to over $300,000, caused the property to be nearly lost to tax deed and never paid rent from 2005 to present, the Appellants can hardly be viewed as coming before the court with clean hands.

Despite this, Douglas agreed to provide Appellants an opportunity to acquire Lot 2 by complying with the terms of the Judgment. Arguably, this is more than they deserved, but a bargained-for settlement that might mitigate the financial encumbrance and tax obligations on the property and restore Lot 1 to Douglas without physical or environmental damage.

Despite this generous opportunity, Appellants persisted in their prior noncompliant conduct by failing to timely perform in almost every regard. The April, 2014 hearing resulted in the Court holding that they had not timely vacated the premises and only substantially complied as a result of the pending motion. Thereafter,

Appellants' noncompliance continued with failures to timely pay county taxes, failure to vacate the premises, encroaching upon Lot 1 even up to the date of the hearings a year later, and failing to pay their share of the Lapham debt as agreed.

"'When an adequate remedy at law is available, the court may not resort to principles of equity.'.....Equity will not afford relief to plaintiffs where they have passed up an adequate remedy at law." Farmers National Bank v. Wickham Pipeline Construction, 114 Idaho 565, 569, 759 P2.d 71, 75 (1988); quoting Austin v. North American Forrest Products, 656 F.2d 1076, 1089 (5th Cir.1981). Appellants had their remedy under the terms of the Judgment: comply and they would receive Lot 2. Fail to comply and Douglas is awarded Quiet Title and Writ of Possession on both lots.

This Court's Judgment entered in February, 2014, provided Defendants with opportunities and remedies at law under the judgment to obtain Lot 2. Defendants inexplicably chose to pass up, ignore or neglect those opportunities. They cannot avail themselves of equitable relief at this juncture.

Further, ".....where inadequate remedy at law has been lost by negligence or lack of diligence, equity will not interfere, since equity is not solicitous for those who sleep on their rights." Id.; quoting American Surety Company of New York v. Murphy, 152 Fla. 862, 13 So.2d 442, 443 (Fla.1943).

Whether by intention or neglect, Defendants failed to pursue their legal remedy and, therefore, come before this court with unclean hands. Their equitable claims are barred. The Trial Court's decision must be affirmed. Douglas is entitled to fees and costs on appeal.

5. The Appellants misstate the District Court ruling as having failed to apply Rules of Equity because no underlying contract exists.

The District Court did not hold that the rules of equity were inapplicable to Vicki's claims. To the contrary, on Defendants Motion to Reconsider, the Court considered these claims and simply rejected them, considering all the factors including Defendants' failure to comply with the judgment, pay the Lapham debt or property taxes during the ten (10) year period of occupancy and causing the Lapham debt to nearly triple from $111,500.00 to $308,827.44. (R. Vol III, pp.6-7)

Contrary to Appellants' Brief, the Court weighed all of the equitable factors noting that the parties' original agreement called for Appellants to pay the Lapham debt which at the outset amounted to $111,500.00, and pay property taxes. Instead, Appellants failed to pay the Lapham debt allowing it to grow to $308,827.44 after modification arising from the parties' Mediated Settlement Agreement and Judgment. Appellants also failed to pay taxes placing the property in jeopardy of tax foreclosure, which was the reason this lawsuit was commenced in 2013, as the County was preparing to take the real property for the delinquent taxes of 2009.

> Finally, with foreclosure looming, the Plaintiff borrowed $270,000.00 from third party lenders (at premium rates because of the history of non-payment) to refinance the loan on the property. The refinance of the loan using the entire parcel (Lots 1 and 2) as collateral is by no means a windfall or inequitable benefit to the Plaintiff, as he is now saddled with this large new loan and may well be forced to sell the property to satisfy this new indebtedness.
>
> R. Vol. III, p.6

The Court also made note of the parties' Mediated Settlement Agreement while represented by counsel that led to the Stipulated Judgment also approved and signed off by the Defendants' counsel, Margaret Williams. In doing so, the Judge held: "The Judgment based on the Mediated Settlement Agreement, represents the benefits and burdens bargained for by the parties. The Defendants are now asking the Court to relieve them from obligations which were bargained for and mutually agreed upon. The Court will not do so." (R. Vol. III, p.7)

This Memorandum Decision and Order and the Court's finding on Appellants' equitable forfeiture arguments disposes of the issues delineated as (a) i, ii, iii, and iv in Appellants' Brief. (Appellants' Brief, pp.15-21).

This Court must affirm the Trial Court's Findings of Fact and Judgment. Douglas is entitled to fees and costs on appeal.

6. Douglas did not "waive" the right to enforce the Judgment's provisions.

Appellants assert that Douglas was untimely in making certain payments but fail to provide any reference in the record on appeal to support the claim. They also argue that these "untimely" payments by Douglas constitute a "waiver" of his right to enforce the Judgment and its requirements imposed on Appellants. This issue was not briefed, argued or otherwise raised to the Trial Court.

"Issues not raised before the trial court may not be considered for the first time on appeal. Vendelin v. Costco Wholesale Corp., 95 P.3d 34, 50, 140 Idaho 416, 432 (2004)

Appellants refer to King v. Seebeck. In that matter, the testimony established that the Plaintiff waived the right to declare a forfeiture by affirmatively promising or leading the Defendant to believe that the provision would not be enforced.

> He permitted the defendant to engage in another effort to raise the money, in the belief that, if secured, the plaintiff would accept it. This attempt to hold on to the forfeiture and waive it does not show such candor and fairness as the circumstances demanded. He ought to be held to this waiver.
>
> King v. Seebeck, 118 P. 292, 295 (1911)

In other words, the defense of waiver arises from an affirmative act misleading to the Defendant to act in reliance. The case cited by Appellants for this argument is inapplicable to the facts in this case. Further, Appellants ignore Idaho law as it defines waiver.

"Waiver is a voluntary, intentional relinquishment of a known right or advantage. Waiver is foremost a question of intent. To establish a waiver, the intention to waive must clearly appear." Seaport Citizens Bank v. Dippel, 735 P.2d 1047, 1050, 112 Idaho 736, 739 (App.,1987)[citations omitted]

"Waiver will not be inferred except from a clear and unequivocal act manifesting an intent to waive, or from conduct amounting to estoppel." Id.

Appellants appear to argue that their late payments to Douglas' attorney resulted in Douglas affirmatively waiving compliance with other terms of the Judgment.[5] The logic is confounding. But, there simply is no evidence that Appellants pattern of non-compliance reflects an intention by Douglas to waive compliance with of the terms of the

[5] Appellants never explain their conclusion the payments were "late". No copies of checks or testimony is in the record showing the date payments were delivered to counsel.

Judgment. Appellants assert that Douglas waived compliance by not "declaring a forfeiture" with every payment received by Appellants and established a "course of conduct in which he led Vicki to believe he had waived strict compliance..." (Appellants' Brief, p. 23). The waiver requires an intent by Douglas, not simply Vicki's subjective belief.

Douglas sought immediate enforcement in April, 2014 when it was apparent that Appellants did not vacate the premises by March 31. The Court gave Appellants an opportunity to comply finding that they had substantially complied, albeit "in significant part, due to the Plaintiff's Motion for Writ of Possession and Quiet Title..." R. Vol. I, P.142.

This "warning" from the Court seemed to have no impact on Appellants who thereafter failed to vacate the premises by April 30th, damaged the premises, did not provide proof of environmental compliance, encroached upon Lot 1 even up to the date of hearings in May, 2015, and failed to pay their share of the Lapham debt.

There should not have been any doubt in Appellants' minds as to their obligations after two (2) unsuccessful trips before the Court. However, Douglas' counsel's subsequent letters and communications made abundantly clear the obligations of the Judgment would be enforced. Pl.'s Exhibit #4, #23, and #25

Aside from the absurdity of suggesting that Douglas willingness to work with Appellants should be deemed a waiver of their required compliance, Appellants' brief presents no fact or law to support their waiver argument. This Court must affirm the District Court's ruling and award attorney's fees and costs to Douglas on appeal.

7. The Court correctly considered all equitable factors in rejecting Appellants' equitable claims.

The Appellants' Brief at page 26 argues that the Court improperly considered the increase of the Lapham debt, unpaid taxes and other factors in deciding against Appellants forfeiture claims by arguing that those claims were released or waived in the settlement agreement leading up to the entry of Judgment. However, the absurdity of Appellants argument is that they seek relief from the Judgment terms by avoidance of their obligations. Those obligations were conditions imposed in the settlement to mitigate the past damages sustained as result of Appellants non-compliance during the leasehold relationship. The claims were not asserted as damage claims in the trial proceedings in May, 2015, but they continued to be relevant in response to the equity claims asserted by Appellants in seeking relief from the Judgment.

In short, the terms of the Judgment, to the extent they imposed financial and performance obligations on Appellants, represented Douglas' bargained for consideration in agreeing to convey Lot 2 if Appellants met those conditions.

Appellants fail to articulate any rationale argument in this section and the Court must affirm the Trial Court and award Douglas fees and costs on appeal.

8. The Court's decision to Issue the Writ of Possession is consistent with the Judgment.

Again, Appellants Brief, at page 28, engages in a ludicrous argument that the Writ of Possession was arbitrary and must be overturned. The stipulated Judgment entered into by the parties through counsel provides that should "Defendants fail to perform any obligation set forth above, the Plaintiff shall be entitled to a Writ of Possession and Judgment of Quiet Title..." (Plaintiff's Exhibit17, pp. 6-7.)

Since Appellants concede they did not perform as provided in the Judgment, they have failed to articulate how the decision is arbitrary or subject to reversal on appeal. Appellants appear to argue that the terms of the Judgment *could be* arbitrary in that it could be enforced even for a "trivial" breach. However, the Court findings and the undisputed facts are clear that the actual breach was not trivial but substantial. The remainder of Appellants' argument in this section and citation to Hull v. Geisler is unavailing. As discussed above, that case dealt with a Court fashioned forfeiture provision where the parties' agreement did not so provide. Further, if the purpose were to compensate Douglas for his damages at the hands of Appellants over the past decade, as suggested by Appellants' Brief, the remedy under the Judgment is woefully inadequate just considering the Lapham debt and its impact.

In any regard, Appellants present no case law for their contention that the results of the Judgment as agreed to by them, were arbitrary.

The Court findings must be upheld on appeal and Douglas must be awarded fees and costs on appeal.

B. The District Court's findings that Doug did not prevent Vicki from complying with the term of the Judgment were supported by the record.

This particular challenge to the Court's Findings of Fact is perhaps the most frivolous of Appellants' frivolous appeal. The issue is unsupported in the record by any fact, testimony or evidence and Appellants' Brief is devoid of relevant citations to the record. The Appellants' Brief argues that Vicki "attempted to pay off her share of the Lapham mortgage". This finding is not supported by the evidence at trial or the undisputed testimony or facts contained within the exhibit.

First, the Judgment is equivocal: "On or before June 30, 2014, Defendants shall pay all remaining balance of the Defendant Vicki's share of the Lapham debt inclusive of all interest and fees thereon, also as described herein below." (Plaintiff's Exhibit 17, p.4, ¶4.) The facts are undisputed that Defendants failed to make this payment and satisfy their share of the Lapham debt.

Further, the parties entered into an Amendment of the Promissory Note and Deed of Trust on the Lapham debt on July 3, 2014. (Plaintiff's Exhibit 3.) That Amendment provided that Defendants were to comply with the Stipulated Judgment and once that compliance was achieved by Defendants paying one half (1/2) of the loan balance inclusive of fees, interest and fees, that Lapham would not pursue collection against Lot 2 until foreclosure occurred first on Lot 1, the lot that Douglas was to retain. (Plaintiff's Exhibit 3, p.2, ¶3.) The net result of the modification placed Douglas in greater jeopardy of losing Lot 1 if Defendants complied with the Judgment and satisfied one-half of the Lapham debt as required. However, Appellants did not do so and thereby put both Lots 1 and 2 at risk of foreclosure as the Note and Deed of Trust were all due and payable in October, 2014. (See Plaintiff's Exhibit 23.)

What followed was simply a pattern of the Defendants ignoring and refusing to comply with the terms of the Judgment all the while placing the entire property at risk of imminent foreclosure. The pending Notice of Default had been in place since August, 2013, immediately following the parties' entering into a Mediated Settlement Agreement. (See Plaintiff's Exhibit 1.)

Second, the urgency created by Defendants' failure to pay was accelerated following counsel's correspondence on August 27, 2014, requesting compliance on

Vicki's part, as well as seeking additional time from Joe Lapham, in an extension of the October 15, 2015, balloon payoff. (Plaintiff's Exhibit 4.)

Douglas' request for additional time was rejected by Lapham. (Plaintiff's Exhibit 23.)

There was no doubt at that point that both Douglas and the Appellants faced imminent foreclosure. Mr. Finney was prepared to proceed with foreclosure after the balloon payment deadline and communicated as much to counsel for Douglas. (Tr. p.174, ll.1-8.) Furthermore, the Appellants were well aware of the obligation to pay the underlying debt or lose the properties. As suggested by Douglas, the payoff should have been made pursuant to the Judgment on June 30th. At most, Appellants might argue that the time was extended while the parties determined the exact amount to be paid off, but that amount was determined by the August 27, 2014, letter and demand was made by Douglas for payment within three (3) weeks thereof. Plaintiff's Exhibit 4, p.2.

Douglas' request for compliance was ignored both directly and through counsel.

The balloon payoff of October 15th came and went and Douglas was forced to obtain third party financing at great expense including over $18,000.00 in loan origination fees due to the poor payment history of the Appellants, as well as payment of property taxes and utilities, LID and sewer hookup services and arrearages not previously paid by the Defendants totaling nearly $15,000.00. (Plaintiff's Exhibit 5, pp. 2 and 4.)

The new loan closed on December 31, 2014, two and a half (2 ½) months after the balloon deadline on the Lapham Note, and six (6) months after the Defendants' obligation to pay their share of the Lapham debt, as provided in the Stipulated Judgment.

Despite this, Defendants argue that the duty of good faith and fair dealing implied in the Judgment was somehow violated by Douglas when he obtained financing upon both lots in an effort to prevent loss of both lots to foreclosure by Mr. Lapham, six (6) months after the deadline for compliance.

The Appellants' argument is bogged down with citations to case law that discusses prevention of performance, but fails to provide any factual support for the argument. In fact, Appellants by their own admission, concede that Vicki had not paid $31,850.45 of her share of the mortgage. Appellants' Brief, p.35[6]

It appears to be Appellants' argument that Douglas was required to convey Lot 2 prior to Vicki's obligation to satisfy her half of the Lapham debt. The Judgment, by its plain terms, disputes Appellants' argument.

> Plaintiff, Douglas Visser, will convey to the Defendant, Vicki Visser, that portion of the real property described in Exhibit "A" and which is depicted on Exhibit "B" attached hereto, designated on Lot 2 consisting of 6.2 acres ONLY upon condition that the Defendants, and each of them, fully and completely perform all of the obligations set forth hereafter: .... On or before June 30, 2014 Defendants shall pay all remaining balance of the Defendant Vicki's share of the Lapham debt inclusive of all interest and fees thereon .....
>
> Plaintiff's Exhibit 17, p.2, ¶A, p.4, 4

Indeed, the failure to pay was not the only failure of performance by the Appellants. Appellants did not timely pay all taxes, did not vacate the premises consisting of Lot 1 as required by the Judgment, the subsequent Court Judgment or even by the time of the trial, May of 2015, and finally, Appellants did not leave the premises in

[6] This does not comply with the actual amounts owed by the Appellants, but regardless,

clean condition and caused damage to the property including physical damage, but also failure to mitigate or provide proof of mitigation for the environmental impact phased in the Phase I Environmental Study.

Appellants disingenuously argue that counsel's August 27th letter requesting their compliance was an imposition of new conditions on them. The correspondence, when read, simply refutes that contention. Furthermore, there is no indication that Appellants were prohibited from paying off the Lapham debt, as required by the terms of the Judgment.

Appellants appear to contend that they could not obtain a new loan from Lapham to pay off their share of the original Lapham debt without receiving title to Lot 2. This issue was addressed in the August 27th letter indicating that if, in fact, a loan was in the works, it could be provided and held in escrow until closing. (Plaintiff's Exhibit 4, p.2.)

Furthermore, there is no record as to a "new loan" from Joe Lapham. His attorney, Rex Finney, testified Lapham was "talking" about loaning Vicki $60,000.00. (Tr. p.178.) No escrow was opened, no loan funds were deposited and no notice was provided to Douglas or counsel of a demand for the Lot 2 deed as part of a "new loan" closing.

The Trial Court listened to the testimony and reviewed the exhibit when she exercised her discretion when she declined to find that Douglas had prevented or frustrated Appellants' performance.

"When reviewing a trial court's ruling under the abuse of discretion standard, we inquire (1) whether the trial court perceived the issue as one of discretion; (2) whether the

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demonstrates the Appellants' own admission that they did not comply with the Judgment.

trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." Newberry v. Martens, 142 Idaho 284, 292, 127 P.3d 187, 196 (2005).

The Appellants have shown nothing to suggest that the court acted outside of the bounds of its discretion.

Further, the Court's factual finding that Douglas did not prevent Appellants' performance must be affirmed on appeal. "The trial court's findings of fact shall not be set aside on appeal unless found to be clearly erroneous. The appellate court is not to substitute its view of the facts for that of the trial court who has opportunity to weigh conflicting evidence and to judge the credibility of witnesses. .... It is the province of the trial court to weigh conflicting evidence and to judge the credibility of witnesses." Pinnacle Engineers, Inc. v. Heron Brook, LLC, 139 Idaho 756, 758, 86 P.3d 470, 472 (2004).

For the reasons set forth above, the Court should affirm the trial court's finding that Douglas did not in any way frustrate or prevent the Appellants' obligation or ability to perform.

Lastly, Appellants again raise a red herring when discussing the discussion of the parties in the Fall of 2014. Appellants' Brief misquotes Douglas' testimony. Douglas testified they spoke two or three times and just a couple words at those times. He testified on cross-examination that Appellants should "do what you're supposed to do" in reference to the Judgment.

This Court must affirm the Trial Court's Finding of Fact that Douglas did not prevent Appellants from performing the conditions of the Judgment.

Douglas is entitled to fees and costs on appeal.

IV. ATTORNEY'S FEES ON APPEAL

A. Appellants are not entitled to fees on appeal.

Appellants' Brief at the bottom of page 39 makes the most cursory two (2) line request for fees and costs on appeal. They cite no rule, case or statute. This is insufficient to entitle Respondent's to fees and costs on appeal.

"We have repeatedly held that we will not consider a request for attorney fees on appeal that is not supported by legal authority or argument." "Attorney fees are awardable only where they are authorized by statute or contract". Capps v. FIA Card Services, N.A., 240 P.3d 583, 590, 149 Idaho 737, 744 (2010); quoting: Bream v. Benscoter, 139 Idaho 364, 369, 79 P.3d 723, 728 (2003).

I.A.R. 41 is not even cited by Appellants. "That rule "sets forth the procedure for awarding attorney fees in appeals before this Court, but does not provide authority to award attorney fees." Capps , 149 Idaho at 744; quoting Swanson v. Kraft, Inc., 116 Idaho 315, 322, 775 P.2d 629, 636 (1989).

A citation to statutes and rules authorizing fees, without more, is insufficient. Although MBNA cited to the above statutory fees provisions, it submitted no argument in its brief as to why fees should be awarded under either I.C. § 12–120(3) or I.C. § 12–121. Thus, we decline to award attorney's fees to MBNA on appeal. Capps v. FIA Card Services, N.A., 240 P.3d 583, 591, 149 Idaho 737, 745 (2010); quoting Carroll v. MBNA America Bank, 148 Idaho 261, 270, 200 P.3d 1080, 189 (2009).

Appellants failed to support their claim for attorney's fees and costs on appeal. I.A.R. 35(b)(5) requires the Respondent to assert their claim for attorney's fees and the

basis for such claim in Respondent's brief. Respondent failed to do so, thereby waiving such claim. The Respondent's fees and costs may not be awarded on appeal.

B. Douglas is entitled to fees and costs on appeal.

"Idaho Appellate Rule (I.A.R.) 41 provides the procedure for requesting attorney fees on appeal. I.A.R. 41 allows this Court to award attorney fees only if permitted by some other statutory or contractual authority; it is not authority alone for awarding fees." Shawver v. Huckleberry Estates, L.L.C., 93 P.3d 685, 696, 140 Idaho 354, 365 (2004)

"Attorney fees may be awarded if authorized by statute or contract." Sherman Storage, LLC v. Global Signal Acquisitions II, LLC, 2015 WL 6657666 (2015); quoting: Stibal v. Fano, 157 Idaho 428, 435, 337 P.3d 587, 594 (2014).

Additionally, Idaho Code § 12-121 permits the award of fees and costs to a prevailing party on appeal where the action is brought or pursued frivolously, unreasonably or without foundation. Idaho Code § 12-121 (2016).

"Attorney fees can be awarded on appeal under that statute only if the appeal was brought or defended frivolously, unreasonably, or without foundation." Thomas v. Madsen, 132 P.3d 392, 397, 142 Idaho 635, 640 (Idaho,2006).

"An award of attorney fees is appropriate if the appellant simply invites the appellate court to second-guess the trial court on conflicting evidence." Gustaves v. Gustaves, 57 P.3d 775, 782, 138 Idaho 64, 71 (2002)

The Appellants only raised two (2) issues on this appeal, both challenge findings of fact of the Trial Court. Further, the Judgment at issue in this case provides that in any action to enforce the terms of the Judgment, the prevailing party is entitled to attorney's fees and costs. (Plaintiff's Exhibit 17, P. 7).

Both appeal issues simply challenge the Trial Court's findings of fact from disputed testimony. This appeal is, therefore, merely an invitation "second guess" the Trial Court's findings of fact on conflicting evidence. Fees and cost should be awarded under Idaho Code § 12-121.

The Trial Court's Memorandum Decision and Judgment must be affirmed and Respondents should be awarded attorney's fees and costs on appeal.

V. CONCLUSION

For the reasons set forth herein, this Court is asked to affirm the Trial Court's Findings of Fact and Conclusions of Law found in the Memorandum Decision and Judgment entered herein. This Court is further asked to award the Respondent his attorneys' fees and costs on appeal based upon Idaho Code § 12-121, the terms of the Judgment and pursuant to the authority of Idaho Appellate Rules 40 and 41.

RESPECTFULLY SUBMITTED this 22nd day of July, 2016.

FEATHERSTON LAW FIRM, CHTD.

By _____
BRENT C. FEATHERSTON
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of July, 2016, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

D. Toby McLaughlin, Esq.
BERG & McLAUGHLIN, CHTD.
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[ ] Overnight Mail
[ ] Hand delivered
[ ] Facsimile No. (208) 263-7557
[ ] Other: _____

By _____